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May 14, 1952

Opinion No. 52-141

Headquarters
Japan Logistical Command
Office of the Command Staff Judge Advocate
Legal Assistance Branch
APO 343, c/o Postmaster
San Francisco, California

Attention: Mr. Richard E. O'Brien
Chief of Legal Assistance Branch

Gentlemen:

This will acknowledge your letter in which you request our opinion on several questions concerning establishment of paternity of an illegitimate child under the laws of Arizona.

Your first question reads:

"Under your state laws, may an illegitimate child be legitimated by the father's acknowledgment of paternity and compliance with any other conditions imposed by applicable statutes?"

Section 27-401, ACA 1939 reads:

"Every child is the legitimate child of its natural parents and is entitled to support and education as if born in lawful wedlock, except the right to dwelling or a residence with the family of its father, if such father be married. It shall inherit from its natural parents and from their kindred heir, lineal and collateral, in the same manner as children born in lawful wedlock. This section shall apply to cases where the natural father of any such child is married to one other than the mother of said child, as well as where he is single."

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Our Supreme Court has declared "the legislature's intention was to legitimate and require the father to support, educate and give a home to, or otherwise provide for, his children born out of wedlock, who, by reason of their tender years, need much care." In re Silva's Estate, 32 Arizona 875, 261 Pac. 40.

The enforcement of rights granted under this section is provided in other sections. Hazelett v. State, 99 Pac. 2nd, 101.

Section 27-210, ACA 1939 reads as follows:

"The father of a child born out of wedlock, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if born in wedlock, thereby adopts it as such; and such child is thereupon deemed for all purposes, born in wedlock from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption."

Our Supreme Court, interpreting this statute held that all four elements must be satisfied, i. e., (1) he shall be the natural father; (2) he shall have publicly acknowledged himself to be the father; (3) he shall have received the child into his family; (4) he shall have otherwise treated it as his legitimate child, in order to prove adoption under this statute. Estate of Cook, 63 Arizona 78.

Failure to comply with any of these requirements will avoid any effect of this particular statute. It is to be noticed that compliance with these requirements amounts to adoption by the father of the child.

The answer to your first question is therefore in the affirmative. It should be noticed that compliance with this statute does not have the effect of making the child legitimate (under Section 27-401, supra, all children are declared legitimate) but has the effect of establishing paternity for purposes of inheritance, duty to provide education, etc.

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Question No. 2:

"If the answer to the foregoing is in the affirmative, must this acknowledgment of paternity be verbal or written?"

It is our opinion that acknowledgment would in any case be proven in court like any other fact question. In Estate of Cook, supra, the acknowledgment by the father was not written but verbal and the court held this was sufficient.

Question No. 3:

"If written, must it be acknowledged before a Notary Public?"

Any written acknowledgment would naturally help to prove the fact of acknowledgment and the fact that the statement was notarized would go to the weight of the proof but notarial acknowledgment is not necessary.

Question No. 4:

"If verbal, what overt acts must be performed by the father as a prerequisite thereto, such as public acknowledgment, taking the child into his home, and otherwise treating it as legitimate?"

In Estate of Cook, supra, the father signed, as father, the high school registration card of one of the children. He orally acknowledged to an old acquaintance and a juvenile probation officer that he was father of the children. The court held that this was sufficient proof. It would appear that the sufficiency of overt acts to constitute public acknowledgment would be a question of fact for the jury.

Question No. 5:

"Must the acknowledgment of paternity be made during the minority of the child?"

There is no requirement as to when the acknowledgment must be made. It is our opinion that the father could meet the requirements of this statute after the child passes the age of minority.

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Question No. 6:

"In your state, does the intermarriage of parents of an illegitimate child legitimate the child?"

As pointed out previously, all children are made legitimate by Section 27-401, supra. The subsequent intermarriage of the parents would merely be further proof of the parentage of the child.

Question No. 7:

"What is the nature of the proceedings instituted by the mother on 'a child born out of wedlock' proceedings, or 'bastardy court' proceedings?"

Section 27-402 provides:

"The mother of a child born out of lawful wedlock may within one (1) year after the birth of such child bring a civil action in the superior court to establish the parentage of such child. Such action shall be commenced by the mother as plaintiff against the alleged natural father as defendant, and the same proceedings had therein as in other civil actions. The parentage may be proved like any other fact, except that the mother of said child shall not be a competent witness if the alleged natural father of said child is dead at the time of the trial, provided, however, that a statement in writing may be made by the parents of said child admitting the parentage thereof, and upon which judgment may be entered. Such action shall be deemed cumulative to the remedies provided in the subsequent sections of this chapter."

This procedure is a civil remedy. Section 27-405 provides another remedy (criminal complaint) for the mother. In such a suit, the State is the plaintiff. This section reads as follows:

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"On complaint being made to a justice of the peace by a woman who is delivered of a child born out of lawful wedlock, or pregnant with such child, accusing any person of being the father of such child, the justice shall take the complaint in writing, under her oath, and thereupon shall issue his warrant of arrest directed to the sheriff or any constable of his county, or of the state commanding him forthwith to bring such accused person before him to answer such complaint."

Under Section 27-414, the Board of Supervisors is authorized to institute bastardy proceedings.

"If any woman is delivered of a child out of wedlock, which is, or is likely to become, a public charge, or is pregnant with such child, the board of supervisors of the county where she resides, or any member thereof, may apply to a justice of the peace of the county to inquire into the facts and circumstances of the case. Such justice may summon the woman to appear before him, and may examine her on oath respecting the father of such child, the time when and place where it was begotten, and any other necessary facts, and thereupon shall issue his warrant to apprehend the putative father. Thereafter the proceedings shall be the same as if the complaint had been made by such woman."

Question No. 8:

"Is the action initiated by the mother in her own right, or through the county or district attorney, in a STATE EX REL proceedings?"

As previously indicated, either method is possible.

Question No. 9:

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"May an illegitimate child through a guardian, natural parent, or one 'in loco parentis,' initiate a court action declaring a putative father to be his father, and if so, and if the action were successful, would this legitimate the child?"

Section 27-403 reads as follows:

"Whenever any person desires to establish his identity or fix his birthright and parentage or both, he may file his application in the superior court of the county of his residence, setting forth his reasons for desiring to establish his identity, birthright, or parentage, and the court may, after the hearing of such application, enter judgment establishing the identity, or the birthright and parentage, or both, of such person. The guardian or next friend of a minor may file such application in the county of the minor's residence, or if the minor be sixteen (16) years of age or over he may file his own application, and the court may hear the same and enter judgment thereon as in the case of other persons."

A successful action under this section would have the effect of establishing parentage, for purposes of inheritance, support, education, etc., the child being legitimate by Section 27-401, supra.

Question No. 10:

"Under your laws, are bastards 'per se' a public charge?"

Under Arizona law there are no bastards. (See 27-401, supra) Thus the duty of support and education of the child falls upon the natural parents of the child. If the parentage is established by one of the procedures hereinbefore discussed, the father must support the child. The state would probably support the child if it had no means of support but the aid rendered by the state would be under our welfare laws and not merely because the child was born out of wedlock.

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Question No. 11:

"Does your state have a statute which provides 'that a child born after a certain date is presumed to be the legitimate child of its natural parents?'"

Section 27-401, ACA 1939, supra, is such a statute. Our Supreme Court said, "Under the provisions of this section, a child born out of wedlock after 1921 was for all purposes the legitimate child of its father with full rights of inheritance and capacity to contest its father's will even though it was never adopted as provided by statute." In re Cook's Estate, 63 Arizona 78, 159 P. 2 797.

Question No. 12:

"Does the law of the domicile of the father of an illegitimate child control in determining whether or not such child has been legitimated?"

10 C. J. S. (Bastards) Sec. 8, page 51, reads:

"In general, the domicile of the father of an illegitimate child determines as to subsequent legitimation, as, for example, either by intermarriage of the parents, by marriage and acknowledgment or recognition, by acknowledgment or recognition, or by public acknowledgment, together with other acts, by the father which are required by the applicable statute, and the laws of the domicile of the child and mother are not controlling with reference to alleged acts of legitimation by the father. According to some cases, the law of the father's domicile at the time he performed the alleged acts of legitimation control."

There is no Arizona case on this subject. Therefore, the general law as set forth by C. J. S. would probably be applicable.

Question No. 13:

"Does your state have a comity statute that would recognize such act of legitimacy if validly performed elsewhere?"

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There is no specific statute but the general rule as set out by C. J. S. in regard to question 12, would seem to indicate that Arizona would recognize an act of legitimacy if validly performed elsewhere.

Question No. 14:

"Does the law of the domicile of the child and/or mother in any way control?"

This question is answered under question 12.

Question No. 15:

"Does the act legitimating a child vest it with all rights as though he were born legitimate?"

Section 27-401, supra, gives a child born out of wedlock every right of a legitimate child.

We trust this will be of some aid in solving your problems. Please feel free to call on us for further assistance whenever needed.

Sincerely,

FRED O. WILSON
Attorney General

ALFRED C. MARQUEZ
Assistant Attorney General

ACM:d